93-27

No. _____

Supreme Court, U.S.
FILED
AUG 02 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOGANANDA HAZRA,
Petitioner,

v.

NATIONAL RX SERVICES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR THE RESPONDENT NATIONAL RX SERVICES, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Sixth Circuit correct in finding that the district court did not abuse its discretion by refusing to allow petitioner's untimely and groundless motion to vacate, brought pursuant to Fed. R. Civ. P. 60(b)(3) and (6)?

2. Was the United States Court of Appeals for the Sixth Circuit correct in finding that the district court did not abuse its discretion by imposing sanctions against petitioner pursuant to Fed. R. Civ. P. 11 for his abuse of the judicial process through repeated frivolous motions?

PARTIES TO THE PROCEEDING

The petitioner is Jogananda Hazra, an individual resident of Columbus, Ohio. Respondent is National Rx Services, Inc., a wholly owned subsidiary of Medco Containment Services, Inc. ("Medco"). Medco is a publicly owned corporation whose securities are traded on the National Association of Securities Dealers Automated Quotation System (NASDAQ).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

INDEX TO APPENDICES vii

OPINIONS BELOW 1

JURISDICTION 3

RULES AND PROVISIONS 4

STATEMENT OF THE CASE 6

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) 24
Amernational Ind., Inc. v. Action-Tungsram, Inc., 925 F.2d 970 (6th Cir. 1991), *cert. denied*, -- U.S. -- , 111 S.Ct. 2857, 115 L.Ed.2d 1024 (1991) 17
Anderson v. Dept. of Health and Human Services, 907 F.2d 936 (10th Cir. 1990) 19
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 24
DeWitt v. Western Pacific R.R., 719 F.2d 1448 (9th Cir. 1983) 26
Di Vito v. Fidelity and Deposit Co. of Maryland, 361 F.2d 936 (7th Cir. 1966) 19
Fleming v. New York Univ., 865 F.2d 478 (2nd Cir. 1989) 20
Gianfriddo v. Western Union Tel. Co., 787 F.2d 6 (1st Cir. 1986) 27
Gonzalez v. Walgreens Co., 918 F.2d 303 (1st Cir.1990) 16
H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976) 17
Jennings v. Hicklin, 587 F.2d 946 (8th Cir. 1978) 18
Klapprott v. United States, 335 U.S. 601 (1949), *modified*, 336 U.S. 942, *motion denied*, 336 U.S. 949 (1949) 16

Page

Leahy v. Bd. of Tr. of Community College Dist. No. 508, 912 F.2d 917 (7th Cir. 1990), *reh'g denied, en banc*, No. 89-1471, 1990 U.S. App. LEXIS 18426 (7th Cir. Oct. 17, 1990) 26
Libby v. Illinois High School Ass'n, 921 F.2d 96 (7th Cir. 1990) 17
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 16
Mastini v. American Tel. and Tel. Co., 369 F.2d 378 (2nd Cir. 1966), *cert. denied*, 387 U.S. 933 (1967) 20
Optimal Health Care Services, Inc. v. Travelers Ins. Co., 801 F. Supp. 1558 (E.D.Texas 1992) . . 19
Patel v. Lutheran Medical Center, Inc., 775 F. Supp. 592 (E.D.N.Y. 1991) 25
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 28
Reynolds v. Humko Products, 756 F.2d 469 (6th Cir. 1985) 27
Simon & Flynn, Inc. v. Time, Inc. 513 F.2d 832 (2nd Cir. 1975) 26
Smith v. Sec. of Health and Human Services, 776 F.2d 1330 (6th Cir. 1985) 16,17
Smith v. Sentry Ins., 752 F. Supp. 1058 (N.D.Ga. 1990) 16

STATUTES

Federal
28 U.S.C. § 1912 . . . . . *passim*
State
Ohio Revised Code, Chapter 4729 7

RULES Page

Sup. Ct. R. 10 . . . . . *passim*
Sup. Ct. R. 13.1 3
Fed. R. App. P. 38 . . . . . *passim*
Fed. R. Civ. P. 11 . . . . . *passim*
Fed. R. Civ. P. 59(e) . . . . . *passim*
Fed. R. Civ. P. 60(b) . . . . . *passim*

MISCELLANEOUS

Ohio Administrative Code, Chapter 4729-1 . . . 7

INDEX TO APPENDICES

APPENDIX A	September 5, 1990 Order of the United States District Court for the Southern District of Ohio.
APPENDIX B	February 12, 1991 Order of the United States District Court for the Southern District of Ohio.
APPENDIX C	July 22, 1991 Order of the United States Court of Appeals for the Sixth Circuit.
APPENDIX D	Excerpt from the Deposition Transcript of Jogananda Hazra (Sept. 11, 1989).

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BRIEF FOR THE RESPONDENT NATIONAL RX SERVICES, INC.

IN OPPOSITION

OPINIONS BELOW

On June 27, 1989, petitioner Jogananda Hazra filed a Complaint against respondent National Rx Services, Inc. (hereafter "National Rx") in the United States District Court for the Southern District of Ohio, Eastern Division, alleging discrimination on the basis of his age, race, and national origin. After discovery, and because it was clear that there were no

facts which could even remotely support the claims of discrimination, and based upon testimony from Hazra which actually negated any basis for such claims, the district court granted National Rx's Motion for Summary Judgment by Opinion and Order filed September 5, 1990. *See* Resp. App. 1a-13a. On September 14, 1990, Hazra filed a Motion to vacate pursuant to Fed. R. Civ. P. 59(e), requesting that the district court vacate its summary judgment ruling. Hazra presented no new arguments, however due to the *pro se* nature of the case, the district court filed an Opinion and Order on February 12, 1991, denying Hazra's Motion to vacate, and giving Hazra the benefit of a further explanation as to why the complaint had been dismissed. *See* Resp. App. 14a-23a.

On February 21, 1991, Hazra filed a Notice of Appeal in the United States Court of Appeals for the Sixth Circuit appealing both the district court's granting of summary judgment and the denial of his motion to vacate the summary judgment order. By Order filed July 22, 1991, the Sixth Circuit affirmed the district court's judgment. *See* Resp. App. 24a-26a. On or about August 2, 1991, Hazra petitioned the Sixth Circuit for a rehearing, again raising the same arguments he had repeatedly raised before. By Order filed November 26, 1991, the Sixth Circuit denied petitioner's request for a rehearing and ordered that petitioner pay National Rx's costs on appeal. *See* Pet. App. D.

On January 31, 1992, Hazra filed yet another Motion to Vacate in the district court, this time pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6), requesting that the court vacate its earlier summary judgment ruling. National Rx filed a Motion for Sanctions on February 11, 1992. By Order filed on June 30, 1992, the district court denied Hazra's Motion to Vacate,

and awarded National Rx sanctions against petitioner in the amount of $2,173.75. *See* Pet. App. C.

Hazra filed a Notice of Appeal to the Sixth Circuit on July 28, 1992, appealing both the denial of his Motion to Vacate and the award of sanctions against him. In an Order filed January 25, 1993, the Sixth Circuit declared Hazra's appeal to be frivolous. Accordingly, the Sixth Circuit affirmed the district court's rulings and additionally awarded National Rx costs and attorneys fees on appeal. *See* Pet. App. A. On February 2, 1993, Hazra filed yet another Petition for Rehearing with the Sixth Circuit. By Order filed February 23, 1993, the Sixth Circuit denied Hazra's request for a rehearing. *See* Pet. App. B.

JURISDICTION

The Order for the United States Court of Appeals for the Sixth Circuit denying petitioner's request for a rehearing was issued on February 23, 1993. On June 29, 1993, petitioner filed in this Court his Petition for a Writ of Certiorari. The Petition is untimely pursuant to Sup. Ct. R. 13.1.[1]

[1]Hazra's original petition was filed with the Court on May 18, 1993, and would have been timely if it had complied with the Supreme Court Rules. The petition was returned by the Court for failure to comply with the rules, and was refiled by Hazra on June 3, 1993, again not in compliance with the Court's rules. The current petition was filed on June 29, 1993, approximately 37 days after the deadline for filing the petition.

RULES AND PROVISIONS INVOLVED

Fed. R. Civ. P. 60(b) states in pertinent part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**
> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * * *
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> * * * *
>
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 11 states in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose

address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. ...The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the singer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. § 1912 states in its entirety:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Lastly, Fed. R. App. P. 38 provides in its entirety:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

The facts related herein are taken from the district court's factual findings contained in its earlier orders. Petitioner Hazra is originally from India and of the Asian race. Resp. App. 2a. Hazra was born on May 30, 1935. Resp. App. 2a. Hazra was 47 years old when he was hired as a junior pharmacist by National Pharmacies, Inc., a co-subsidiary of National Rx, in April, 1983. Resp. App. 2a. Hazra has admitted that he was not discriminated against because of his age, race or national origin at the time of his hiring in 1983. Resp. App. 2a.

In February, 1984, Hazra voluntarily transferred from his position with National Pharmacies, Inc., to a job in Ohio with the respondent National Rx. Resp. App. 2a. National Rx operates a mail service pharmacy in Columbus, Ohio, whereby patient prescriptions are filled and provided to the patients by

mail. Resp. App. 2a. Under Ohio law, a licensed registered pharmacist must review, check and approve each prescription that is dispensed by the company. Resp. App. 2a.

After his transfer, Hazra registered as a pharmacy intern in order to become a licensed pharmacist. Resp. App. 2a. To become registered, the intern must work under the supervision of a registered pharmacist or "preceptor." Resp. App. 2a-3a. National Rx agreed to act as Hazra's "preceptor," and with the respondent's help, Hazra eventually became a registered pharmacist. Resp. App. 3a.

On March 5, 1985, National Rx hired Hazra for the position of registered pharmacist. Resp. App. 3a. Hazra admitted that there was no discrimination in the hiring of him for the position, which included a raise in pay. Resp. App. 3a.

Under Ohio law, Ohio Revised Code, Chapter 4729 and the Ohio Administrative Code, Chapter 4729-1, *et seq.*, each registered pharmacist is required to ensure that each drug that he or she dispenses to a patient is the same drug that the physician prescribed to the patient. Resp. App. 3a. According to Hazra's own testimony, the registered pharmacist had the additional responsibility of ensuring that the label on the prescribed bottle correctly identified the dispensed drug, and with respect to this responsibility, the pharmacist was held strictly accountable by National Rx if the wrong drug, or the wrong strength of the drug, was prescribed to the patient. Resp. App. 3a.

In the Spring of 1987, National Rx adopted a disciplinary policy for staff registered pharmacists who committed dispensing errors. Resp. App. 3a. The disciplinary policy

called for corrective action whenever a staff registered pharmacist dispensed a prescription that resulted in the patient receiving the wrong drug, the wrong strength, the wrong dosage or form of the drug, or the equivalent generic form of the drug where the brand name drug was prescribed. Resp. App. 3a-4a. Under the disciplinary policy, National Rx reviewed each situation independently and employed various disciplinary measures, including counselling, warning, probation, and termination. Resp. App. 4a. As a general guideline under the policy, a staff registered pharmacist was warned and placed on probation if he or she committed three significant dispensing errors within a three month period. Resp. App. 4a. Examples of a significant dispensing error would be erroneously providing the patient with the wrong strength of drug, or the wrong drug altogether. Resp. App. 4a. The policy further provided that any further dispensing error during the probationary period could result in termination. Resp. App. 4a. Hazra admitted that in early 1987, the policy was communicated to all of the pharmacists at National Rx over a one month period during the weekly meetings, and that the policy was a "guideline" for disciplinary action and would be applied on a case-by-case basis. Resp. App. 4a.

On May 12, 1987, Hazra dispensed a drug which was double the strength prescribed by the physician. Resp. App. 4a. Hazra's supervisor met with him and counselled him as to the importance of accuracy. Resp. App. 4a.

On June 26, 1987, Hazra again dispensed a drug which was double the strength prescribed by the physician. Resp. App. 4a. Instead, the prescription was filled with 500 milligram tablets, double the strength of the actual prescription. Resp. App. 4a-5a. Hazra's supervisors met with

him again and cautioned him to be more careful. Resp. App. 5a.

A few days later, Hazra was again reprimanded for erroneously dispensing a sublingual form of a drug (to be placed under the tongue of the patient) rather than the prescribed oral form of the drug (to be swallowed). Resp. App. 5a. The plaintiff acknowledged that this was his third error in two months, and that he could have been discharged pursuant to the disciplinary policy for making the errors, if National Rx had chosen to terminate him. Resp. App. 5a. Instead, the plaintiff was placed on probation and informed that any additional mistakes in the next 60 days would result in his termination. Resp. App. 5a.

Less than thirty days later, Hazra committed another dispensing error. Resp. App. 5a. Hazra acknowledged that although he again could have been terminated for this mistake pursuant to the disciplinary policy, he was given yet another chance. Resp. App. 5a. Hazra was placed on 90 days probation and again was told that any additional errors during the probation period would result in his termination. Resp. App. 5a.

In October, 1987, during his second probationary period, Hazra committed two more serious dispensing errors. Resp. App. 5a. In both instances Hazra dispensed the wrong drug. Resp. App. 5a. Hazra acknowledged that the medication that was sent to each patient was not the medication that had been prescribed. Resp. App. 5a.

Based on the six serious dispensing errors committed by Hazra, National Rx terminated Hazra's employment on October 30, 1987, pursuant to the terms of the disciplinary

policy. Resp. App. 5a. Hazra has admitted his errors and does not refute, in the least, National Rx's stated basis for his termination. Resp. App. 5a.

The district court granted National Rx's motion for summary judgment, stating, "The Court has been provided no evidence upon which it could conclude that the defendant applied the [disciplinary] policies disparately...." Resp. App. 12a. The district court ruled further:

> The plaintiff has admitted that he could not name another person who had more errors that had not been terminated, and he further admitted that the errors were the reason for this termination [citation omitted]. Therefore, there appears to have been equal application of the policies to all employees at National Rx.
>
> Based upon the aforementioned reasons the Court finds that there is no question of material fact, and that the plaintiff has failed to make even a prima facie showing of discrimination, which is needed to prevail as a matter of law.

Resp. App. 12a. Thus, Hazra's claims failed from the outset on the basis of his own testimonial admissions and his failure to produce any evidence or inference in support of his discrimination claims.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Sixth Circuit properly affirmed the district court's denial of petitioner's motion to vacate pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6). Petitioner's only stated ground for the motion was an allegation of fraud by defendants, by the district court, and by the court of appeals. A motion filed pursuant to Rule 60(b)(3) must be filed within a reasonable amount of time after the judgment and in no event more than one year from the judgment. Petitioner's motion, brought more than one year after the judgment, was untimely. Petitioner's attempt to circumvent the one year limitation by citing 60(b)(6) was improper. Furthermore, notwithstanding the timeliness issue, the Rule 60(b) motion was properly denied on its merits, because the petitioner came forward with no evidence in support of the motion. The only arguments raised in Hazra's 60(b) motion were those which had already been raised and rejected twice by the district court and twice by the court of appeals. In order to prevail on a Rule 60(b) motion, a movant must show by a preponderance of the evidence that fraud or some other impropriety was involved in the judgment. Petitioner was merely using the Rule 60(b) motion as an attempt to relitigate his claims. The denial of the motion was within the sound discretion of the district court, and no abuse of that discretion occurred.

The United States Court of Appeals properly affirmed the district court's imposition of sanctions pursuant to Fed. R. Civ. P. 11. The district court's sanctions were based upon petitioner's filing of a frivolous and unsupported motion to vacate the court's earlier summary judgment ruling. The motion was patently frivolous in that it failed to raise any additional evidence or arguments, relying instead upon the

same arguments which had already been twice rejected by each the district court and the court of appeals. Due to the patently frivolous nature of the petitioner's motion, the imposition of sanctions was well within the court's discretion under Rule 11. The amount of the sanctions was likewise reasonable within the discretion of the district court.

The United States Court of Appeals properly granted sanctions against the petitioner pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38 for filing a frivolous appeal relating to the denial of his 60(b) motion. Petitioner had previously attempted to vacate the same summary judgment ruling by filing a Fed. R. Civ. P. 59(e) motion, which was denied. The petitioner appealed the denial of the 59(e) motion, and the court of appeals affirmed the denial of the motion. Petitioner, nevertheless, brought a Rule 60(b) motion with not one strand of additional grounds or evidence. The court of appeals properly imposed sanctions for petitioner's repeated frivolous attempts to relitigate his unsupported claims. The imposition of sanctions was within the discretion of the court of appeals, and no abuse of that discretion occurred.

ARGUMENT

The Rules of the United States Supreme Court make clear that "review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. Here the district court and the court of appeals have repeatedly held on the undisputed facts that petitioner's claims of discrimination fail as a matter of law. Petitioner has filed incessant appeals, motions for rehearings, and motions to vacate in an attempt to change this result. However, other than expressing disagreement and disappointment with the result, petitioner offers no legitimate reason why this Court should review the decisions below.

Nothing in the petition for writ of certiorari, or in the case as it developed below, presents a valid reason for granting review in this case. The decisions of the lower federal courts are correct on the merits, and there are no conflicts with decisions of this Court or with decisions of the federal circuit courts of appeal. In addition, there is no important question of federal law raised by the petition. In fact, the petitioner expresses only disagreement with the rulings of the courts below and their exercise of discretion in awarding sanctions against him. The decisions of the both the district court and the court of appeals are consistent with the "accepted and usual course of judicial proceedings" and present no "special or important reasons" for granting a writ of certiorari in this case. Sup. Ct. R. 10.

I. THE DISTRICT COURT PROPERLY REFUSED TO VACATE ITS EARLIER JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)(3) and (b)(5).

On January 31, 1992, Hazra filed a motion with the district court pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6) alleging "fraud," and requesting that the district court vacate its September 5, 1990 Order granting defendant's motion for summary judgment. Both the motion and the brief in support contained rambling and incoherent allegations of fraud by National Rx, National Rx's in-house counsel, National Rx's outside counsel, United States District Judge George C. Smith, and United States Court of Appeals Judges for the Sixth Circuit Damon J. Keith, Anthony J. Celebrezze, and Chief Judge

Gilbert S. Merritt.[2] The following excerpt reveals the tone and content of Hazra's brief to the district court:

> Because the defendant obtained summary judgment by perpetrating fraud on plaintiff in answer to plaintiff's interrogatories by and through Defendant's Labor and Associate Counsel and Defense Counsel, and thereby preventing the plaintiff to prove his claim, and judge Smith from this Court perpetrated fraud and by irregular decision granted and affirmed the defendant's summary judgment motion, and appellate judges Merritt, Keith and Celebrezze perpetrated fraud and by irregular decision granted and affirmed the judgment of judge Smith which in itself is the product of fraud and irregular decision, therefore, the plaintiff is demanding that for the sake of justice the court vacate and set aside the judgment of judge Smith and the defendant's summary judgment motion be denied, and the plaintiff be allowed to proceed to trial to prove his case....

Petitioner's Brief in Support of The Motion to Vacate Judgment, filed in the district court on January 31, 1992, at 8-9 (quoted as appears in original). Hazra's motion, brief and affidavit contained nothing more than rambling unsupported allegations of fraud against everyone who had argued or

[2] In his Petition for Rehearing to the United States Court of Appeals for the Sixth Circuit, filed on August 28, 1992, Hazra had additionally alleged that Magistrate Judge Terrence P. Kemp had "attempted to deceive and defraud" him (emphasis in original).

decided a motion unfavorably toward him. He used the "fraud" label to get his foot in the door of Rule 60(b), but once in, Hazra offered no new arguments or evidence, rather he simply reiterated his already rejected arguments on the merits of his case. Hazra's own submissions leave serious doubt as to whether he comprehends the meaning of the term "fraud."

This case is actually a garden variety *pro se* case which includes no novel arguments or evidence. The case certainly does not involve "fraud." Rather, the petitioner has used the label of "fraud" to express his dissatisfaction with the results of his case, and to attempt to reargue his case yet again. Cases of this type are repeatedly addressed by the federal district courts and courts of appeal, and the courts in this case handled petitioner's claims within the usual course of judicial proceedings.

Vacation of a prior judgment upon grounds of fraud falls exclusively under Fed. R. Civ. P. 60(b)(3). A motion filed pursuant to Fed. R. Civ. P. 60(b)(3) must be filed "within a reasonable time" and in any case "not more than one year after the judgment...was entered or taken." Fed. R. Civ. P. 60(b). As the district court found, summary judgment was granted against the petitioner on September 5, 1990, and his Rule 60(b) motion was filed on January 31, 1992, more than one year after the judgment. Pet. App. C. Thus, as both the district court and the court of appeals noted in their Orders, Hazra's Fed. R. Civ. P. 60(b) motion based upon fraud was untimely. Pet. App. A at 2; Pet. App. C. Hazra, likewise, has made no attempt in his petition to this Court to argue that his motion pursuant to 60(b)(3) was timely.

The case law demonstrates that the rulings of both the district court and the court of appeals in this case were within the "accepted and usual course of judicial proceedings." *See* Sup. Ct. R. 10. In *Gonzalez v. Walgreens Co.*, 918 F.2d 303 (1st Cir. 1990), the court held that, "Appellants' failure to file their Rule 60(b)(3) motion within one year of the judgment 'is an absolute bar to relief from the judgment.' [Citation omitted.]." *Id.* at 305; *see also Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1062 (N.D.Ga. 1990).

Hazra's alternative reliance upon Fed. R. Civ. P. 60(b)(6) was also misplaced. Where a 60(b) motion based upon fraud is untimely, the movant cannot utilize the 60(b)(6) "catchall" in an attempt to avoid the one year limitation period. Fed. R. Civ. P. 60(b)(6) may only be utilized where none of the specifically enumerated grounds, (*i.e.*, (b)(1)-(b)(5)), for a 60(b) motion are relied upon. *Klapprott v. United States*, 335 U.S. 601, 613 (1949), *modified*, 336 U.S. 942, *motion denied*, 336 U.S. 949 (1949); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 845, 863 and n.11 (1988). This Court has consistently recognized that where, as here, the alleged fraud falls under 60(b)(3), the one year maximum limitation period for filing the motion to vacate is mandatory and cannot be circumvented through the use of 60(b)(6). *Id.*; *see also Smith v. Sec. of Health and Human Services*, 776 F.2d 1330 (6th Cir. 1985)("'[I]t is settled that an appellant cannot circumvent the one year limitation by invoking the residual clause (6) of Rule 60(b).'" *Id.* at 1333 (citation omitted)).

Leaving aside the issue of untimeliness, petitioner's 60(b) motion was properly denied because it had no merit. The relief provided by Fed. R. Civ. P. 60(b) is "extraordinary and may properly be granted only when the movant can demonstrate that the conduct challenged hindered it from

making good a claim or defense." *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1121 (6th Cir. 1976). Such relief is available "only under exceptional circumstances." *Id.* As the Sixth Circuit noted, "A Rule 60(b) motion is addressed to the sound discretion of the Court." *Id.* at 1119. Determinations pursuant to Rule 60(b) "'will not be disturbed on appeal unless the court has abused its discretion.'" *Smith v. Sec. of Health and Human Services*, 776 F.2d 1130, 1332 (6th Cir. 1985)(quoting *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1160 (6th Cir. 1980)); *see also Gonzalez v. Walgreens Co.*, 918 F.2d 303, 304 (1st Cir. 1990). An "'[a]buse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.'" *Amernational Ind., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991), *cert. denied*, -- U.S. -- , 111 S.Ct. 2857, 115 L.Ed.2d 1024 (1991)(quoting *Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 132-33 (6th Cir. 1990); *see also Libby v. Illinois High School Ass'n*, 921 F.2d 96 (7th Cir. 1990)("An abuse of discretion generally only occurs where no reasonable person could take the view adopted by the trial court. [Citation omitted.] If reasonable persons could differ, then the appellate court will not be able to find an abuse of discretion." *Id.* at 98.).

The rulings of the lower courts in this case are consistent with the legal standards annunciated above. In denying petitioner's 60(b) motion, the district court held:

> [T]he Plaintiff offers no new evidence or fresh argument to suggest that he has a cause of action under Rule 60(b)(6) that would lead the Court to alter its earlier judgment.

* * * *

> [A]s each of the previous ruling[s] of this Court and the Sixth Circuit have stated, there is simply no evidence to support [petitioner's] claims. Simply because the Plaintiff believes something does not make it so.

Pet. App. C. The court of appeals affirmed the district court's denial of petitioner's 60(b) motion, stating:

> Not only were no exceptional circumstances presented in this case, but the arguments presented in Mr. Hazra's Rule 60(b) motion have been repeatedly rejected by the district court and this court on appeal. A Rule 60(b) motion must be denied if, as here, it is merely an attempt to relitigate the case. *See Mastini v. American Tel. & Tel. Co.*, 369 F.2d 378, 379 (2nd Cir. 1966), *cert. denied*, 387 U.S. 933 (1967).

Pet. App. A at 2.

The district court properly noted that the petitioner's belief or allegation is not enough to satisfy Rule 60(b). In *Jennings v. Hicklin*, 587 F.2d 946 (8th Cir. 1978), the court faced a situation similar to that presented by the petitioner here. The plaintiff in *Jennings* was likewise proceeding *pro se*. The Eighth Circuit affirmed the district court's denial of the 60(b) motion stating:

> Jennings filed his Rule 60(b) motion, which contained lengthy, vague and rambling

> allegations that the judgment had been procured by fraud. ...The district court denied the motion on the bases that Jennings' allegations regarding jurisdiction were totally lacking in merit and that Jennings' allegations of fraud were conclusory and insufficient to justify further action.

Id. at 947.

In so holding, the Eighth Circuit explained the burden of proof for a 60(b) motion, "The burden of proving such fraud and misrepresentation is, of course, upon the applicant and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence." *Id.* at 948 (citations omitted); *see also Anderson v. Dept. of Health and Human Services*, 907 F.2d 936 (10th Cir. 1990)("We affirm the district court's denial of the Rule 60(b)(3) motion because appellant has not presented 'clear and convincing proof' of fraud, misrepresentation, or misconduct." *Id.* at 952.); *Di Vito v. Fidelity and Deposit Co. of Maryland*, 361 F.2d 936 (7th Cir. 1966)("conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud, much less to carry the burden of resolving that issue." *Id.* at 939.); *Optimal Health Care Services, Inc. v. Travelers Ins. Co.*, 801 F. Supp. 1558, 1561 (E.D.Texas 1992).

Hazra has made broad conclusory allegations of fraud, but has presented absolutely no evidence to support his claims. The district court noted, "Though not raising even a scintilla of additional evidence suggesting that there was in fact unlawful discrimination, the [petitioner], *inter alia*, alleged that this

Court's ruling was based upon collusion with counsel for the Defendant which lead to a 'cover-up' and ultimately fraud." Pet. App. C. Because petitioner presented no evidence to support the allegations of fraud or other misconduct in his Fed. R. Civ. P. 60(b) motion, such motion was properly denied under the rule and the applicable law.

In reality, Hazra's 60(b) motion was simply another attempt to relitigate the claims he had repeatedly lost.[3] Such use of Fed. R. Civ. P. 60(b) is improper. Rule 60(b) is not to be used to relitigate the merits of a claim. In *Fleming v. New York Univ.*, 865 F.2d 478, (2nd Cir. 1989), the court held that, "a Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations and cannot serve as an attempt to relitigate the merits." *Id.* at 484; *see also Mastini v. American Tel. and Tel. Co.*, 369 F.2d 378 (2nd Cir. 1966), *cert. denied*, 387 U.S. 933 (1967). Hazra's original claims were properly dismissed by the court for lack of evidence. His Rule 60(b) motion was, likewise, properly denied because Hazra again presented no evidence to support his claims. The denial of Hazra's Rule 60(b) motion was within the sound discretion of the district court, and no abuse of that discretion has occurred.

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[3] Likewise, Hazra's petition to this Court does not discuss any of the grounds for certiorari, because none are applicable, nor does it discuss the legal issues relevant to Fed. R. Civ. P. 60(b) and 11. Rather, petitioner is only attempting to create yet another opportunity to reargue the "factual merits" of his case.

II. REPEATED FRIVOLOUS MOTIONS AND APPEALS ATTEMPTING TO RELITIGATE ISSUES ALREADY DECIDED BY BOTH THE DISTRICT COURT AND COURT OF APPEALS WERE PROPER GROUNDS FOR THE IMPOSITION OF SANCTIONS.

Hazra has filed a number of frivolous motions during the course of this litigation, including: the Motion to Vacate pursuant to Fed. R. Civ. P. 59(e), the appeal of the denial of his 59(e) motion, the Petition for Rehearing to the Sixth Circuit regarding his loss of the appeal on his 59(e) motion, the Motion to Vacate pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6), the appeal of the denial of his 60(b) motion, the Petition for Rehearing to the Sixth Circuit regarding his loss of the appeal on his 60(b) motion, and the Petition for a Writ of Certiorari to this Court, all of which had no basis in law or fact. As such, they are also violations of Fed. R. Civ. P. 11, 28 U.S.C. § 1912, and Fed. R. App. P. 38. Hazra has repeatedly presented the United States District Court for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit, and now this Court, with pleadings, motions and other papers which contain outlandish conclusory allegations wholly unsupported by any evidence. Notwithstanding this clear abuse of judicial process from the outset, National Rx never even moved the court for sanctions until after Hazra had been repeatedly informed by the district court that his case was baseless, through the granting of National Rx's summary judgment motion and the denial of Hazra's Rule 59(e) motion to vacate.

The district court acknowledged having granted some leniency to Hazra as a pro se litigant. Ultimately, however, Hazra's repeated abuse of the judicial process resulted in

sanctions by both the district court and the court of appeals. It is with the backdrop of this flagrant abuse of judicial process that Hazra now asks this Court to overturn the district court's decision to impose sanctions. Hazra offers no legal or factual basis for arguing that the award(s) should be overturned.

Because it is unclear from Hazra's petition which award of sanctions he is requesting that this Court review -- the court of appeal's affirmance of the district court's award, the appellate court's award, or both --, National Rx will address both.

A. **Sanctions by the District Court**

Fed. R. Civ. P. 11 allows district courts, within the exercise of their own discretion, to impose sanctions for abuse of the judicial process. Rule 11 states in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other information; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11 (emphasis added). Hazra's motion to vacate pursuant to Fed. R. Civ. P. 60(b)(3) and (b)(6) was not

"well grounded in fact and [] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law...," and was therefore a violation of Rule 11. Accordingly, after denying the motion, the district court granted sanctions against Hazra, stating:

> This Court has allowed the Plaintiff to proceed in this utterly frivolous and unconscionable litigation far too long at a significant cost to the Defendants and the Courts. Plaintiff's Motion to Vacate Judgment has further unnecessarily and wastefully prolonged this litigation.

Pet. App. C. Thereafter, the United States Court of Appeals for the Sixth Circuit affirmed the imposition of sanctions, holding:

> The test for the imposition of Rule 11 sanctions is whether the individual's conduct was reasonable under the circumstances. *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). With this standard in mind, our review of the record and briefs leads us to the conclusion that the district court did not abuse its discretion when it imposed sanctions. *See Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988). Similarly, we conclude that this appeal is equally frivolous, and that defendant should receive its attorney fees on appeal. 28 U.S.C. § 1912; Fed. R. App. 38; *Wrenn v. Gould*, 808 F.2d 493, 504 (6th Cir. 1987).

Pet. App. A at 3.

This Court has held that, "[A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).[4] In this case, the district court awarded National Rx only $2173.75 as sanctions for Hazra's frivolous Rule 60(b) motion. *See* Pet. App. C. By the time sanctions were finally awarded, Hazra should have been well aware of the frivolity of his motion since he had repeatedly made those same arguments on no less than four prior occasions[5], losing in every instance. In granting the sanctions, the district court acknowledged that the entire litigation had been "frivolous and unconscionable." Pet. App. C. The district court's small award of $2173.75 in sanctions reflected only the amount of money spent by National Rx in responding to Hazra's unsubstantiated Rule 60(b) motion. *See* Pet. App. C. The amount awarded was properly within the court's discretion, given the many thousands of dollars National Rx was forced to spend defending this "frivolous and

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[4]Where Rule 11 has been violated, sanctions are mandatory. In *Albright v. Upjohn Co.*, 788 F.2d 1217 (6th Cir. 1986), the court held that, "Rule 11 expressly mandates the imposition of sanctions once a violation is found. 'The selection of the type of sanction to be imposed lies of course within the district court's sound exercise of discretion.' *Westmoreland [v. CBS]*, 770 F.2d [1168,] 1174 [(D.C.Cir. 1985)]." *Id.* at 1222.

[5]In response to National Rx's summary judgment motion, in support of his motion to vacate pursuant to Fed. R. Civ. P. 59(e), in appealing the Order denying the motion to vacate and granting summary judgment, and in petitioning for a rehearing by the appellate court.

unconscionable" litigation. *See Patel v. Lutheran Medical Center, Inc.*, 775 F. Supp. 592 (E.D.N.Y. 1991).

The *Patel* case involved facts virtually identical to those presented here. The plaintiff in *Patel* brought an age discrimination claim. The defendant offered a valid nondiscriminatory reason for the termination of Patel's position, and when plaintiff offered no evidence in rebuttal, summary judgment was granted in defendant's favor. Patel then moved, *inter alia*, pursuant to Fed. R. Civ. P. 60(b) to have the judgment vacated. Like Hazra, Patel attached an affidavit to his motion which essentially reiterated the allegations made in the complaint and other prior pleadings. The district court denied Patel's motion and imposed sanctions pursuant to Fed. R. Civ. P. 11 on the basis that the Rule 60(b) motion lacked legal foundation. The amount of the sanctions was the defendant's expenses, including attorney's fees, in opposing Patel's motion. *Id.* at 599.

The explicit language of Fed. R. Civ. P. 11 mandated the imposition of sanctions against Hazra. The modest sum of $2173.75 imposed was well within the district court's discretion provided under the Rule and controlling case law, and was within the "accepted and usual course of judicial proceedings." Sup. Ct. R. 10.

B. **Sanctions by the Court of Appeals**

The Order of the district court awarding sanctions against Hazra included the following footnote of stern admonition: "Plaintiff is hereby forewarned that, absent additional or new evidence, that any further pleadings or appeal in the instant matter shall be deemed frivolous and the Plaintiff will be subject to further sanctions." *See* Pet. App. C, footnote 2.

Hazra, nevertheless, blindly appealed the district court's order, despite raising no new arguments or facts. The district court's rulings were affirmed, including the imposition of Rule 11 sanctions against Hazra. In addition, the United States Court of Appeals for the Sixth Circuit imposed further sanctions upon Hazra for his frivolous appeal. These sanctions were for $2802.85, the amount of National Rx's expenses, including attorney's fees, incurred in the appeal.[6] The legal precedent for this award was cited in the Sixth Circuit's Order. Pet. App. A at 3.

The court of appeals has the power to impose sanctions for a frivolous appeal under both 28 U.S.C. § 1912 and Fed. R. App. P. 38. In *DeWitt v. Western Pacific R.R.*, 719 F.2d 1448 (9th Cir. 1983), the court cited both of the foregoing sections and held that, "An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *Id.* at 1451. The foregoing statement accurately describes the petitioner's conduct in this litigation. In the *De Witt* case, the court awarded the appellee attorney's fees and double costs as a sanction for the appellant's frivolous appeal. *Id.* In so holding, the court cited the following quotation from *Simon & Flynn, Inc. v. Time Inc.*, 513 F.2d 832, 835 (2nd Cir. 1975): "'Counsel must realize that the decision to appeal should be a considered one, ...not a knee-jerk-reaction to every unfavorable ruling.'" *DeWitt*, 719 F.2d at 1451.

Attorney's fees are also a proper component of a sanctions award pursuant to Fed. R. App. P. 38. *Leahy v. Bd. of Tr. of Community College Dist. No. 508*, 912 F.2d 917 (7th

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[6] This amount was set forth in a marginal mandate dated March 3, 1993, on page 3 of the court of appeals' January 25, 1993 Order. The marginal mandate was omitted from Pet. App. A.

Cir. 1990). Furthermore, sanctions for a frivolous appeal are appropriate in discrimination cases where appeals are prosecuted despite the plaintiff's inability to come forward with facts sufficient to establish even a *prima facie* case of discrimination. *Reynolds v. Humko Products*, 756 F.2d 469 (6th Cir. 1985). Holding that sanctions were appropriate under both Fed. R. App. P. 38 and 28 U.S.C. § 1912, the United States Court of Appeals for the Sixth Circuit stated in *Reynolds*:

> The appeal in the present case clearly is frivolous. Appellant did not cite to this Court any evidence whatsoever in the record to support his claim of disparate treatment. The case should not have been appealed. Appellant needlessly complicated a meritless case in a futile effort to reverse the judgment of the district court.

Reynolds, 756 F.2d at 473-74; *see also Gianfriddo v. Western Union Tel. Co.*, 787 F.2d 6 (1st Cir. 1986). The frivolity of Hazra's appeal is even more apparent. Hazra has prosecuted two motions to vacate and two separate appeals, as well as two Petitions for Rehearing, all in an attempt to overturn an adverse summary judgment ruling, which was based upon the fact that he came forth with no evidence to show a *prima facie* case of discrimination. The imposition of sanctions by the court of appeals was within the sound discretion of that court, and no abuse of discretion has occurred. Indeed, as the cited cases establish, the action by the court of appeals in awarding sanctions against Hazra was within the "accepted and usual course of judicial proceedings." Sup. Ct. R. 10.

The total amount of sanctions imposed by both the district court and the court of appeals is $4976.60, a fraction of the amount of money National Rx has expended in the four years defending this litigation, which the district court has acknowledged was "utterly frivolous and unconscionable" from the outset. Indeed, National Rx's costs in opposing this Petition for Certiorari, which is yet another frivolous pleading in violation of 28 U.S.C. § 1912, will exceed the total amount of sanctions at issue here. Most importantly, however, the purpose of Fed. R. Civ. P. 11 is to deter frivolous and baseless filings, and as Hazra's continued abuse of the judicial process has indicated, the amount of the sanctions imposed has not yet achieved that deterrent effect. Thus, if the amount of the sanctions is to be attacked, it is only because it was not enough.

III. PETITIONER'S REFERENCE TO THIS COURT'S HOLDING REGARDING MIXED-MOTIVE IN A DISCRIMINATION CASE IS INAPPLICABLE HERE.

Hazra has made repeated reference in his Petition to the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), implying that this decision has some bearing on his claims. The *Price Waterhouse* decision, however, does not avail the petitioner's cause. While this issue was not an issue on appeal, nor has it properly been raised as one of the questions presented in the petition for certiorari, the fact of the matter is that it has no legal relevance to this case. Even under the mixed motive theory addressed in *Price Waterhouse*, in order to defeat a motion for summary judgment Hazra would have had to come forward with some direct evidence of discrimination. Instead, Hazra admitted in his own testimony that he had no direct evidence of discrimination by National

Rx. Resp. App. 28a. Thus, the deathknell to this belated and unavailing argument is Hazra's own testimony. Hazra has repeatedly failed to produce any evidence of direct discrimination, and in the absence of this direct evidence his claims fail under *Price Waterhouse* as well. *See Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1062-63 (N.D.Ga. 1990).

CONCLUSION

The district court and the court of appeals have heard the arguments presented in Hazra's petition seven times now.[7] The inescapable conclusion which the courts considering this case have reached is that petitioner Jogananda Hazra was terminated from his job for excessive pharmaceutical dispensing errors in violation of company policy. From the outset of this litigation, the petitioner has failed to come forward with any evidence to support his claims of discrimination. Despite this lack of evidence, since the adverse summary judgment ruling Hazra has repeatedly brought motions to vacate, appeals, and petitions for rehearing in nothing more than an attempt to relentlessly relitigate his unsupported claims. Hazra's Fed. R. Civ. P. 60(b) motion was properly denied and sanctions were properly imposed against him by the district court pursuant to Fed. R. Civ. P. 11, and by the court of appeals pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38. This case fails to present any important federal question, any conflict among the

[7] The summary judgment motion, the Rule 59(e) motion to vacate, the appeal of the denial of the motion to vacate and the granting of the summary judgment motion, the petition for rehearing to the court of appeals regarding the foregoing appeal, the Rule 60(b) motion to vacate, the appeal of the denial of the Rule 60(b) motion, and the petition for rehearing to the court of appeals regarding the denial of the Rule 60(b) motion.

circuits, or any conflict with a decision of this Court. In short, there is nothing about this case which justifies review by this Court under Sup. Ct. R. 10. Accordingly, Respondent National Rx Services, Inc. respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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